IN THE

Supreme Court of the United States.

JOHN E. ROLLER, Plaintiff in Error,

vs.

STEPHEN HOLLY AND OTHERS, Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR, JOHN E. ROLLER.

To the Honorable Judges of said Court:—

It appears from the record that McClintic and Proctor brought suit against Roller in the State Court of Texas, and their petition appears on page 11 of the record, in which they sought to enforce the specific performance of a contract to purchase a tract of land in that State, sold by one Jordan, their assignor, to Roller, and in connection therewith, to subject the land to an equitable lien created by operation of law and not a lien created by contract, for a balance of purchase money remaining unpaid thereon, there being no statute however expressly authorizing such a suit to be brought in the Courts of Texas against a non-resident of the State.

The Texas Court issued the notice and it was sent to Harrisonburg, Va., and was served on Roller on December 30th, 1890, to appear January 5th, 1891, at Groesbeck, Texas, to defend said

action in the Texas Court, but there was no seizure in rem, by attachment or otherwise of the land, nor were the Hollys, to whom Roller had sold the land, and who were in possession of the same, made parties to the suit, nor was the debt due from them to Roller, which was also a vendor's lien on the land, levied upon by garnishment. In default of the appearance of the defendant, a judgment was rendered against Roller, and an order of sale of the land was made, and the land was sold. At this sale H. W. Williams and W. L. Jackson bought the land at a very inadequate price and sold the same to Joseph Peeples.

Roller sometime thereafter instituted his suit in the State Court against Stephen and William Holly, his vendees, for the purpose of specifically enforcing his contract of sale to them and to subject the land to the payment of the purchase money due him, and to this suit he made Joseph Peebles, H. W. Williams and William L. Jackson, as claiming to be the owners of the land and as asserting an interest therein adverse to his claim, parties defendant also.

The last named three defendants made answer and set up therein that the land had been sold under decree of Court, in the suit of McClintic and Proctor against Roller, that Williams and Jackson had bought the land and had sold it to Peebles. To this answer as insufficient in law, Roller filed a demurrer and a special replication also, in which he claimed that the judgment in that suit and the sale of the land had not been obtained by due process of law, but in violation of the Fourteenth Amendment of the Constitution of the United States, upon the ground that as there was no statute in the State of Texas authorizing such a suit against a non-resident, for the specific performance of a contract to purchase land or to enforce an equitable lien, for the unpaid purchase money, created by operation of law and not created by any contract, and as there

was no levy of any writ of attachment or other like writ on the property, the jurisdiction of the State Court over the property did not attach, and the proceeding was a nullity therefore as to him, and moreover that the notice given to him was insufficient and unreasonable and was not due notice, so that the whole proceeding was void, as not being due process of law.

The State Court gave Roller a personal judgment against the Hollys for the purchase money due him on the land, but gave a judgment in favor of Jackson, Williams and Peeples for the land itself, a decision of the cause which is absurd and inconsistent upon its face and contradictory of itself. Roller then made application to the Court of Civil Appeals, and the case was heard therein and the judgment of the lower court was affirmed.

An application was then made to the Supreme Court of Texas for a writ of error, and the same was which in effect was an affirmation of the judgment of the Court of Civil Appeals. Then an application was made to your Honors Court and a writ of error was allowed to the judgment of the State Court.

THE ISSUES.

The Plaintiff Roller in each of the Courts in the State of Texas, inferior and appellate, made the point:

I.

That inasmuch as there was no statute of the State of Texas authorizing such a suit against a non-resident for the specific performance of a contract to purchase land or to enforce an equitable lien, for the purchase money, created by operation of law and not created by contract, and as there had been no seizure in rem of the lands nor any notice to Roller's vendees, who were in possesion thereof, nor any garnishment of the purchase

money due him from them, the jurisdiction of the Courts of the State of Texas did not attach, and the whole proceeding was void as to him as not being due process of law, and cited in support of this proposition the cases of Hart vs. Sampson, 110 U. S. Sup. Ct., page 151, and Arndt vs. Griggs, 134th U. S. Sup. Ct., page 316.

That the time given in the notice served upon him in Harrisonburg, Va., Dec. 30th, 1890, to appear in Groesbeck, Texas, on 5th of January, 1891, was wholly unreasonable and insufficient, and was not due process of law, and was not such due and orderly proceeding under the facts disclosed by the record, as the law requires to constitute due process of law.

II.

That he was entitled because of his lien against the Hollys to be subrogated to their rights as subpurchasers of the lands in controversy, which under well settled decisions of the Court of Texas included the right to pay to Jackson, Williams and Peeples the money expended by them and compel the said Jackson, Williams and Peeples to reconvey the land to them or to have submitted to a foreclosure for the benefit of Roller, subject to the right of the said Williams, Jackson and Peeples to a repayment of the money expended by them as aforesaid, and he cited in support of this proposition the following authorities: Savage vs. Fairman, 53 Texas, 601; Terry vs. Cutler, 23 S. W., p. 539; McKelvain vs. Allen, 58 Texas, 383; Howard vs. North, 5th Texas, 290.

THE DECISION.

The cause was tried upon the issues thus made up and was decided by the Tribunals of the State of Texas against the plaintiff in error practically upon all of them.

Neither of the Courts of the State of Texas, in-

ferior or appellate, however, including the District Court, the Court of Civil Appeals and the Supreme Court of that State, referred to or passed upon, in any manner, the first of the issues thus presented to them, but in the judgment rendered by them and in the opinion filed by Associate Justice Fly, of the Court of Civil Appeals, ignored the decisions cited to them of the Supreme Court of the United States in the cases of Hart vs. Samson and Arndt vs. Griggs, in which it was distinctly held that "unless otherwise specially provided by statute" the proceeding was in PERSONAM and did not amount even to constructive notice to the non-resident and was a nullity.

The Courts of the State of Texas did hold upon the other issues presented to them that the judgment was valid and the proceedings had thereon was due process of law, not because Roller, the plaintiff in error, had any opportunity to be heard, or to make any defence, or that he could have done so, but because, as Associate Justice Fly says in his opinion, "he was given the statutory notice," which then only required five days before the first day of the return day of the Court, and he "could not claim any special privileges because he lived in Virginia," and denied the claim of Roller to the right to be subrogated to rights of the Holleys and to redeem the land by repaying to Williams, Jackson and Peeples the money expended by them in purchasing the land under the Williams and Proctor judgment.

ARGUMENT UPON THE LAW.

I.

Surely it is unnecessary to cite any other authorities than those of Hart vs. Samson, 110 U. S., page 151, and Arndt vs. Griggs, 134th U. S., page 329, to demonstrate that the Courts of Texas erred in failing to pass upon the first of the issues

thus presented to them, and that upon that issue alone, if upon no other, their judgments must be reversed and annulled.

II.

As to the sufficiency of the notice. It will be observed that there is a repetition of the requirement of due process of law in the Constitution of the State of Texas, and it would seem that something was intended; something in the guaranty that before life, liberty or property should be taken from any one that there should be *due process of law*.

This evidently was made for the protection of the citizens of the United States, and it would seem that there was wisdom in the provision to prevent one State from passing laws whereby her Courts could deprive a non-resident of his property and give it over to a resident of said State, and her Courts to decide that it was properly and legally done.

Due process of law, as understood by the average citizen, would mean that process of law which was proper, appropriate and suitable. How the Courts of the State of Texas could have reached the conclusion that five days' notice was sufficient in any and all cases, no matter where the defendant might be when served, or how situated he might be, is difficult to comprehend, especially in view of the fact that there are other Court Houses within her borders which a resident of said State could not reach, perhaps, within said five days, and no doubt there are many places in Texas that a resident of the Northern States could not possibly reach within said five days. It must be therefore that the Legislature of that State had arrived at the conclusion that there was no necessity for a defendant to have any notice, or to make any appearance or to undertake to defend at all against any complaint that might be set up against him if he had property within the State.

It would seem that the Courts of Texas intended to decide in the case before the Court that inasmuch as there was a vendor's lien, that is a mere equitable lien created by law, and not created by contract, to secure the payment of the notes held by McClintic and Proctor on the property once owned by Roller, which was real estate in Texas, that the Court had jurisdiction of the property, in any view of the matter, whether there was or was not a statute of the State such as the case of Hart vs. Sampson and Arndt vs. Griggs had decided to be necessary, and it mattered not whether the defendant, Roller, was present or not, whether he had any notice or not, or whether the notice given him afforded him an opportunity to appear and defend said suit or not.

The Texas Courts seem to have reached the conclusion that while there can be no personal judgment rendered against a defendant, who has been served out of the State, yet when it is proceeding to deprive a person of his property situate in that State the rule has no application; that when the property of a non-resident is in the State of Texas the Court can issue a notice giving the defendant five days' notice, and then the property may be sold.

It remains for Your Honors' Court to decide whether, under the circumstances of this case, this was due process of law and a valid judgment.

In 111 U. S., 712, and cases cited, it is defined to be due process of law, when there is both *due notice and an opportunity to be heard*, and on page 709 it is said that if the proceeding be found to be "arbitrary, oppressive and unjust" it is not due process of law.

It must be that the defendant has been properly brought into Court, and he must be given an op-

portunity to make his defence, and when this is not done there is no due process of law.

See 20 Am. State Reports, 547, and notes where many decisions are collected, 556.

43 Am. State Reports, 525, State vs. Billings.

42 Am. State Reports, 595, Lawson vs. Dickey.

27 Am. State Reports, 759, Doyle, petition.

28 S. E. Reporter, 909, Violet's Heirs vs. City Council, 1896, Supreme Court of Appeals of Virginia, and cases cited.

A distinguished text writer in discussing the question how a State in which land lies can subject it to the jurisdiction of its Courts, so that a valid judgment can be rendered against it on a personal demand against a non-resident owner, declares "that the State has the constitutional power to do this by process adapted to the purpose is undoubted; but in order that the process provided by the State may comply with the requirements of due process of law, IT MUST AFFORD THE DEFENDANT REASONABLE OR ADEQUATE NOTICE OF SUIT, and one which from the nature of the process will be likely TO REACH HIM IN TIME TO DEFEND THE ACTION." RENO ON NON-RESIDENTS, SECTION 244.

It is a significant fact that the Legislature of the State of Texas since the controversy has arisen, in this case, has amended the law as to notice and it now provides that ten days' notice shall be given, instead of five. It may well be asked, why this change, if five days' notice was reasonable and sufficient in all cases?

According to the argument of Justice Fly of the Court of Civil Appeals, if the statute giving five days' notice was due process of law as to the plaintiff in error because he "had received the statutory notice," the same would have been true if the statute had provided for one day's notice, instead of five, or if the statute had provided that no notice need be

given at all, provided only it applied to residents and non-residents alike.

Nor can it be argued that the State is sovereign as to all property within its limits and may prescribe in what manner the non-resident owner of such property may be brought before its Courts. It is distinctly decided that it must provide a statute authorizing its Courts to make a publication or give defendant constructive notice by service outside of the State, and declaring that such publication or such service, when made, shall authorize the Court to decree, in which case such constructive notice is sufficient under the authority of Hart vs. Samson and the other cases cited.

In the case before the Court the point is distinctly made that there never was a statute of the State of Texas authorizing such proceedings as was had in the case before the Court, and even if the State of Texas had enacted such a statute, yet if it were in the language of Your Honors' Court in Hager v. Reclamation District, 111 U. S., 709, "found to be arbitrary and oppressive and unjust," it might be declared to be not due process of law.

It may be argued that the plaintiff in error, Roller, had from the 5th of January until the 9th in which to appear and answer and defend, and that this made the notice sufficient, and made it due process of law. It does not appear in the record anywhere that Roller could have done so. The opinion of the Court of Civil Appeals does not place its decision upon any such law, but upon the statute which requires five days' notice and upon the right of the State of Texas to prescribe the five days' notice for residents and non-residents alike, holding that the latter could claim no special privileges no matter where such non-resident might live. The notice served on Roller appears on page 13 of the record, and it says to him that the plaintiff's petition will be heard at Groesbeck, Texas on the first

Monday in January, which is the fifth day of January, 1891, and you are required to appear at such time and place and answer said petition. Was this notice given to Roller in order to induce him to stay away, because he would think he could not possibly get to Texas and make answer to the petition on Monday, the fifth day of January, since he could only get there on Sunday before, and no sooner, and would have to go into Court the next day? Did not McClintic and Proctor know that Roller would consider it an impossibility to reach Groesbeck, Texas, in time to make a defence, and that he would remain away rather than attempt a vain thing? When they misled him by such a notice, as was perhaps the case, could they obtain any benefit from the fact that he was so misled?

Moreover, if the Texas statute provided for the summons upon five days' notice to answer a petition on the fifth of January, while at the same time it gave the defendant four days more in which to make an answer, of which fact he is not informed in the notice, is not the effect of the statute to mislead the defendant, and does it constitute due process of law?

Surely it is not due process of law to make the time in which the defendant is to appear so short that it is an impossibility to comply with the law.

Surely it is not due process of law to provide for process by which the full time given in which to appear, is hidden from the defendent, and he is deprived thereby of the privilege of appearing. It is submitted that such laws do not constitute due process of law.

There cannot be due process of law which does not give a defendant ample time to prepare his defence and time to go and attend the Court and present said defence.

There was no time in this case given in which to

ascertain what was to be done, or how to do it, and none in which to do it.

In Davidson vs. New Orleans, 96 U. S., 97, it is said that when the party appeared in both Courts and had a full and fair trial in each of said Courts, if such is not "due process of law" the words can have no meaning, and we should say that where no opportunity was given in which he could appear, that if such could be called "due process of law" the words could have no meaning.

In Hager vs. Rec. Dict., No. 108, 111 U. S., 711, it is said: "Such assessments can only be enforced by suits, *and of course to their validity it is essential that notice be given to the tax payer and opportunity be afforded him to be heard respecting such assessments.*" * * * A number of decisions as to the necessity of notice and opportunity to be heard cited by counsel and given in a note are all satisfied when a hearing is thus allowed.

Where one will have to make a race with an express train and take all chances of missing connections, and other delays, in order to get to the place of hearing, to say nothing of other business matters demanding attention, the needs of one family, and other just demands upon his time, and to say nothing of making any preparation for defence, it certainly cannot be said that such notice was *due process*; in fact it would be very *undue*, and no process of law.

The ancient practice under the common law tolerated no such unreasonable haste and speed.

2 Chitty's General Practice, page 176.

III.

The plaintiff in error, Roller, was deprived by the decrees complained of in the record of another valuable right of property that belonged to him.

It may be stated in this way: First.—It is very certain that the Hollys as sub-vendees of Roller

were entitled to pay off the balance due McClintic and Proctor from Roller, and to retain the land as their property, subject only to any unpaid balance which they might owe the said Roller, after crediting what they had paid for him, upon their original indebtedness to him. This right is conceded and sustained by numerous decisions of the Supreme Court of the State of Texas. It is but honest and simple justice and would be recognized and enforced by the Courts of equity in any State; second.—Now Roller holding the lien against them and the land is entitled by subrogation to this right of the Hollys, as a security for his debt. The statement of this equity, ought to be all that is necessary to cause its acceptance by any Court.

Yet the Courts of the State of Texas denied this right to Roller and deprived him of his property in that particular also, by refusing to pass upon or determine the question, and by so doing—by failing and refusing to award him this right—under their decrees, they deprived him of this right of property without due process of law.

CONCLUSION.

It is submitted in conclusion that it is clear that the defendant, Roller, has been deprived of his property under a proceeding that was not due process of law and that this Court must so hold

W. S. LAIDLEY,
For Plaintiff in Error.